No. 17-024

In The
Supreme Court of the Yuma Indian Nation

---------- ♦ ----------

YUMA INDIAN NATION,

Plaintiff/Appellee,

v.

THOMAS & CAROL SMITH,

Defendants/Appellants.

---------- ♦ ----------

Appeal From the Yuma Indian Nation Trial Court

---------- ♦ ----------

Brief of Defendants/Appellants

---------- ♦ ----------

TEAM 248

Counsel for Defendants/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Sources

QUESTION(S) PRESENTED

1. Whether the Yuma Indian Nation courts have personal and subject matter jurisdiction over Thomas Smith and Carol Smith, or in the alternative, whether the tribal court should stay this suit while the Smiths seek a ruling in Arizona federal district court.

2. Whether sovereign immunity, or any other form of immunity, protects the Yuma Indian Nation, the YIN Economic Development Corporation, and/or the EDC CEO and accountant from the Smiths' claims.

STATEMENT OF THE CASE

A. Statement of the Facts

In 2007, the Yuma Indian Nation ("YIN"), contracted with Thomas Smith, a certified financial planner and accountant. R. at 1. Under the contract, Thomas would provide the YIN with financial advice on matters of economic development as needed. R. at 1. Thomas, who lives and works in Phoenix, Arizona, signed the contract with the YIN at his office. R. at 1. By the very terms of the contract, any and all disputes arising under the contract would be litigated in a court of competent jurisdiction. R. at 1. Additionally, Thomas was to maintain absolute confidentiality for any and all tribal communications and economic development plans. R. at 1. Thomas prepared and submitted written reports to the YIN Tribal Council, personally presenting them at Council meeting on the reservation every quarter. R. at 1.

This arrangement continued from 2007 to 2017; Thomas provided the YIN with economic development advice, communicating primarily with tribal chairs and Tribal Council members regularly. R. at 1. In 2009, the YIN chartered the YIN Economic Development Corporation ("EDC"). R. at 1. Thereafter, Thomas communicated primarily with Fred Captain, the EDC CEO, but also with Molly Bluejacket, the EDC's accountant. R. at 1.

The YIN chartered the EDC pursuant to its 2009 commercial code, and the Tribal Council provided a one-time $10 million loan from the YIN general fund. R. at 1. The EDC's corporate charter states that its reason for existence is "to create and assist in the development of successful economic endeavors, of any legal type or business, on the

reservation and in southwestern Arizona." R. at 1. The EDC was chartered to operate on and off the reservation, though it does give tribal preference in hiring employees and contracting with outside entities. R. at 1. On average, 25 tribal citizens work full-time for the EDC. R. at 1. Thomas is a non-Indian.

The EDC was chartered to be operated by its own board of directors, all of whom must be experienced businesspeople. R. at 1. The board of directors serve staggered terms; each year, one of the directors' terms expires and must be reelected or replaced. R. at 1. At all times, two of the five directors must be non-Indians or citizens of other tribes. R. at 1. While the Tribal Council—having declared the EDC a wholly-owned subsidiary of the YIN—may remove any director for cause, or for no cause by a 75% vote, the charter also provides that the sitting directors would elect or reelect a person for the expiring seat by simple majority. R. at 1.

The EDC may buy and sell real property in fee simple title on or off the reservation, to buy any other types of property in whatever form of ownership, or sue and be sued. R. at 2. In an effort to protect the EDC from litigation, the YIN stated that the EDC, its board, and all its employees were protected by tribal sovereign immunity, as far as legally possible. R. at 2. The EDC keeps detailed corporate and financial records, submitting them to the YIN on a quarterly basis for review and approval. R. at 2. On an annual basis, the EDC forwards fifty percent of its profits to the YIN; but only $2 million has been paid in the last eight years. R. at 2. The EDC's debts cannot encumber, or implicate in any way whatsoever the assets of the YIN. R. at 2. Moreover, the EDC cannot borrow nor lend money in the name of, or on behalf of, the YIN. R. at 2. The EDC cannot grant liens or interests of any kind to attach to the assets of the YIN. R. at 2.

In 2010, Thomas obtained approval from the Tribal Council to sign a contract with his sister, Carol Smith. R. at 2. Carol is a licensed stockbroker, living and working in Portland, Oregon. *Id*. Carol's contract with Thomas is identical to the one Thomas signed with the YIN, including a term that both are required to comply with the latter's contract with the YIN. R. at 2. Carol was to provide Thomas, the EDC, and the YIN advice for stocks, bonds, and securities, from her workplace in Portland. R. at 2.

Carol gives her brother advice directly through email, telephone, the post, and other delivery services, while she submits her bills to Fred Captain at the EDC; the EDC mails her payments. R. at 2. While vacationing in Phoenix, Carol visited the YIN reservation twice with her brother. R. at 2. Thomas often forwards Carol's professional advice to the YIN, the EDC, and its officers. R. at 2.

In the last eight years, the EDC has paid only $2 million—an average of $250,000 a year—to the YIN's $10 million investment. R. at 2. In 2016, the EDC began investigating the possibility of marijuana cultivation, seeking to make inroads on the burgeoning marijuana market after a state-wide referendum in fall of 2016 now allowing medicinal use in Arizona. R. at 2. The EDC lobbied the YIN Tribal Council to enact a tribal ordinance, making marijuana cultivation and use on the reservation legal for any and all purposes. R. at 2. Notably, the state referendum rejected the provision which would have allowed cultivation and use of marijuana for recreational purposes. R. at 2.

The EDC began to develop a marijuana operation. R. at 2. Thomas and Carol are morally opposed to being involved in the drug trade; marijuana remains a Class I controlled substance under the Controlled Substance Act, 21 U.S.C. § 811. Thomas reported the EDC's plans to the Arizona Attorney General, who then wrote the YIN and

the EDC a cease and desist letter regarding the development of recreational marijuana operations. R. at 2.

B. Statement of the Proceedings

Enraged at the Smiths for reporting their activities, the Tribal Council and the EDC filed suit against the Smiths in tribal court for breach of contract, violation of fiduciary duties, and violation of their duties of confidentiality. R. at 3. The Nation sought recovery for the liquidated damages amount set out in the contracts. R. at 3.

Making special appearances, the Smiths filed identical motions to dismiss the YIN suit based on lack of personal jurisdiction and subject matter jurisdiction over them and this suit. R. at 3. Alternatively, the Smiths asked the trial court to stay the suit while they pursue a ruling in Arizona federal district court as to whether the tribal court has jurisdiction over them. R. at 3. The trial court denied both motions. R. at 3.

While still under their special appearances, the Smiths filed answers denying the YIN claims. R. at 3. The Smiths also counterclaimed against the YIN for monies due under the contract and for defamation on the basis that the YIN has impugned their professional skills. R. at 3. Additionally, the Smiths impleaded the EDC, and its CEO, Fred Captain, and accountant, Molly Bluejacket, in their official and individual capacities. R. at 3. Thomas and Carol made the same claims against the third party defendants as they made against the YIN. R. at 3.

The trial court dismissed all of the Smiths' counterclaims against the YIN, as well as the third party defendants on the theory of sovereign immunity. R. at 3. The Smiths filed an interlocutory appeal in this Court, requesting it to decide these issues and issue a writ of mandamus ordering the court to stay the suit. R. at 3.

STANDARD OF REVIEW

This Court reviews the tribal courts decision to deny the Smiths' motions to dismiss for lack of subject matter jurisdiction and personal jurisdiction *de novo. Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008). Generally, a plaintiff bears the burden of establishing personal jurisdiction over the defendant by a preponderance of the evidence. *Niemi v. Lasshofer*, 770 F.3d 1331, 1348 (2014). Similarly, the plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence. *Freeman v. United States*, 875 F.3d 623, 628 (Fed. Cir. 2017). Whether a party is entitled to sovereign immunity is a question of law and is reviewed *de novo*. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).

SUMMARY OF ARGUMENT

This Court should reverse the decision of the trial court denying the Smiths motion to dismiss the YIN suit based on lack of personal jurisdiction and subject matter jurisdiction. The trial court incorrectly ruled that it had jurisdiction over the Smiths. With respect to jurisdiction, the general rule is that non-tribal members like the Smiths are not subject to tribal jurisdiction. The Supreme Court of the United States has recognized two exceptions to this rule, but has emphasized that the exceptions are limited. These limited exceptions did not apply to the Smiths, because the YIN's cause of action does not attempt to regulate the Smiths' conduct on YIN land.

This Court should allow the Smith's claims to go forward because the YIN waived its sovereign immunity when it provided in its contract with Thomas Smith that any and all disputes arising from the contract would be litigated in a court of competent jurisdiction. Even if this provision did not have such an effect, the YIN effectively

waived its sovereign immunity by initiating a suit against the Smiths. The EDC is not protected by sovereign immunity because a fair consideration of the factors used in determining whether an entity is an arm of a tribe or simply a business clearly weighs against such an extension. Finally, the EDC's CEO and accountant cannot claim sovereign immunity as a matter of law, nor does any other form of immunity protect them.

Finally, pursuant to YUMA TRIBAL CODE § 2-1501, this Court has the authority to issue a writ of mandamus to compel the trial court to stay the suit against the Smiths as a matter of public importance.

ARGUMENT

A. The YIN Trial Court Incorrectly Determined That it Had Jurisdiction to Hear This Case.

1. The Court Lacks Personal Jurisdiction Over Thomas Smith and Carol Smith.

The YIN courts cannot exercise personal jurisdiction over Thomas and Carol Smith without violating their right to due process. The Indian Civil Rights Act incorporates a statutory version of most, but not all, of the United States Constitution's Bill of Rights into tribal courts, requiring the tribal courts to determine through the relevant due process provisions whether they have personal jurisdiction over the defendant.[1] The ICRA permits tribes to apply their own jurisdictional rules and create

[1] 25 U.S.C. § 1302(a)(8)("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."); *see also United States v. Wheeler*, 435 U.S. 313, 328 (1978); 1-7 Cohen's Handbook of Federal Indian Law § 7.02 (2017)(tribal courts "often consult Supreme Court precedents defining the parameters of personal jurisdiction under the . . . due process clause").

self-imposed limitations on personal jurisdiction. The YIN has expressly limited its own personal jurisdiction. Under the YUMA TRIBAL CODE § 2-102, "[t]he Tribal Court may [only] exercise jurisdiction over any *person* or *subject matter* on any basis consistent with . . . the Indian Civil Rights Act of 1968 . . . or prohibitions contained in federal law." (emphasis added). The ICRA requires tribes to follow the same basic test for personal jurisdiction as is applied in federal forums and federal courts.

A court may not make a binding judgment against an individual with whom the forum "has no contacts, ties, or relations." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). The general rule is that a defendant must have "certain minimum contacts" with the tribe, "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *see also Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 923 (2011). Where a plaintiff asserts personal jurisdiction based solely on an alleged link between the underlying controversy and the forum, "the defendant's suit-related conduct must create a substantial connection with the forum [jurisdiction]." *Walden v. Fiore*, 134 S.Ct. 1115, 1121 (2014).

Personal jurisdiction can be general or specific. General jurisdiction is based on the defendant's continuous and systematic contacts with the forum. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984). Specific jurisdiction requires that the defendant's activities be related to the case at hand. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). The critical issue in the due process analysis for

personal jurisdiction is whether the defendant's conduct and connection with the forum are such that he should reasonably anticipate being sued there. *Id*. at 474.[2]

Personal jurisdiction only exists when the defendant has such minimum contacts with the forum state "that he should reasonably anticipate being haled into court there." *World–Wide Volkswagen Corp. v Woodson,* 444 U.S. 286, 297 (1980). To establish minimum contacts, the court must determine whether the defendant purposefully directed its activities at residents of the forum, and whether the plaintiff's claim arises out of or results from "actions by the defendant himself that create a substantial connection with the forum [jurisdiction]." *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102, 109 (1987). Additionally, if the court determines that the defendant's actions create sufficient minimum contacts, it must then consider whether the exercise of personal jurisdiction over the defendant offends "traditional notions of fair play and substantial justice." *Id.* at 113. Both prongs of this two-part inquiry demonstrate the absence of personal jurisdiction over the Smiths.

First, neither Thomas or Carol Smith had "such minimum contacts" with the YIN that they should have "reasonably anticipate[d] being haled into [this] court." *World-Wide Volkswagen*, 444 U.S. at 297. Carol Smith is a domiciliary of Portland, Oregon, and Thomas Smith is a domiciliary of Phoenix, Arizona. R. at 1-2. Neither of the Smiths

[2] The Supreme Court has long noted:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. 235, 253 (1958).

"purposefully direct[ed]" their activities at the YIN or its members, nor do the YIN claims "arise out of or result from action[s] by the defendant . . . that create a substantial connection with" the YIN or its members. All of Ms. Smith's communications regarding stocks, bonds, and securities issues were provided directly to her brother for EDC via email, telephone, and postal and postal delivery services. R. at 2. Any contact Ms. Smith had with the YIN was incidental and not in relation to any business relationship. Further, Ms. Smith never made any disclosures to the Arizona Attorney General of EDC's or the YIN's plans to develop a marijuana operation, which is the basis of the litigation. R. at 3.

The same is true for Thomas Smith. Mr. Smith had no "minimum contacts" which could subject him to the YIN's tribal jurisdiction. Mr. Smith conducted the majority of his work as a financial advisor from his office in Phoenix, Arizona outside of the boundaries of the YIN's reservation. R. at 1. Further, since 2009, Mr. Smith has dealt directly with the EDC is his role as a financial advisor, and he has specifically worked with EDC's CEO and accountant since that time. R. at 1. The YIN's claims for relief demonstrate that any relevant conduct by Mr. Smith—involving the YIN or EDC—would have occurred outside of the YIN courts' jurisdictional boundaries. The claims for breach of contract, violation of fiduciary duties, and violation of the duty of confidentiality all arise from Mr. Smith's off-reservation conduct. The fact that Mr. Smith's actions occurred off-reservation puts him beyond the YIN's self-limited jurisdiction that extends only to the "boundaries of the Yuma Indian Reservation" as described by statute. YUMA TRIBAL CODE § 1-102. Each claim arises from Mr. Smith's off-reservation disclosure to the Arizona Attorney General that the EDC's planned to begin cultivating and selling marijuana. R. at 2-3.

In addition, any claim by the YIN that Mr. Smith's visits within the boundaries of its reservation would be an assent to tribal jurisdiction should fail. At best, any time Mr. Smith spent on the reservation was *de minimus* and bears little relation to his relationship with the YIN at large or the claims brought in tribal court. As shown above, the conduct of the Smiths on which the YIN brings suit did not occur, and could not have occurred, within the YIN's reservation and is, outside the personal jurisdiction of the Court.

Second, the exercise of personal jurisdiction over the Smiths would "offend notions of fair play and substantial justice." *Asahi Metal*, 480 U.S. 102 at 109. Ms. Smith's conduct, as described above, cannot create personal jurisdiction over her. Even if Ms. Smith's actions could somehow be viewed as "directed" at the YIN, which they cannot, she was never within the boundaries of the YIN for business purposes and she never "purposely availed" herself to the jurisdiction of the tribal court. In regards to Mr. Smith, an inherent unfairness would exist in subjecting him (a nonmember) to an unfamiliar tribal court. As Justice Ginsburg opined in *Strate v. A-1 Contractor*, 520 U.S. 438, 459 (1997), having "a non-resident, non-Indian defendant defend against [a] . . . claim in unfamiliar [tribal] court" would violate the constitutional guarantees of due process. The question is not close: There is no personal jurisdiction over Mr. Smith or Ms. Smith, and the decision of the lower court was in error.

2. <u>The Court Lacks Subject Matter Jurisdiction Over The Yuma Indian Nation's Claims.</u>

The claims against the Smiths fall outside of the Court's subject matter jurisdiction because they rest on alleged conduct that did not occur within the boundaries of the YIN reservation. Moreover, the Smiths have not submitted themselves to the jurisdiction of the YIN. By statute, the "territorial jurisdiction" of this court extends only

"to the territory within the exterior boundaries of the Yuma Indian Reservation." YUMA TRIBAL CODE § 1-102. As this and other sections of the Tribal Code recognize, the boundaries of the reservation and a few smaller subsets of the outer boundaries constitute the YIN's "jurisdictional area." *Id*.

The Supreme Court of the United States "ha[s] never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 333 (2008). The Supreme Court has previously held that unless a tribe is regulating members, "tribal jurisdiction is . . . cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." *Phillip Morris USA, Inc. v King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009); *see also Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1091 (8th Cir. 1998)(*Montana* does not "allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside reservations.").

Basic principles of subject matter jurisdiction require this court to reverse the decision of the lower court and remand the case for dismissal of the claims against the Smiths because they rest on conduct—Mr. Smith's disclosures to the Attorney General of Arizona that the YIN and EDC had plans to begin cultivating and selling marijuana - that did not occur within the "territorial jurisdiction" of the YIN reservation. R. at 2.

a. Neither of the *Montana* exceptions applies.

Even if the YIN were able to produce evidence that its claims against the Smiths concerned some minimal conduct within the boundaries of the YIN reservation, and it cannot, this case would be controlled by the rule that "the inherent sovereign powers of

an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. U.S.*, 450 U.S. 544, 565 (1981). *Montana* recognized two exceptions to that rule, but neither one applies to the case at hand. Under the first exception, tribes may "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members." *Id*. The second exception permits jurisdiction over nonmember conduct that "threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe." *Id*. at 566.

The Supreme Court of the United States has limited both *Montana* exceptions to consensual relationships bearing a requisite nexus or regulation protecting tribal governance or internal relations. The YIN courts lack jurisdiction under *Montana* because they seek to adjudicate off-reservation conduct by nonmembers who did not consent to tribal jurisdiction. *Plains Commerce Bank*, 554 U.S. at 337.

b. The first *Montana* exception does not apply.

The first *Montana* exception has two elements: (1) there must be a consensual relationship between the nonmember and the tribe, established by nonmember activity or conduct on tribal land; and (2) the tribe's exercise of authority must have "a nexus to the consensual relationship itself." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001). Absent a nexus between the claims brought in the YIN courts and the Smiths' contacts with YIN land, the first *Montana* exception does not apply. *Plains Commerce Bank*, 554 U.S. at 338.

The Supreme Court has repeatedly confirmed that tribal court jurisdiction exists only where the litigation directly and specifically seeks to regulate nonmember activities on tribal land. *Id*. For example, in *Plains Commerce Bank,* an Indian couple sued a non-

Indian bank claiming that the bank discriminated against the couple by selling land they had been leasing from the bank to a non-Indian. 554 U.S. at 320. The Indian couple argued that tribal jurisdiction over the bank existed based on the bank's "lengthy *on-reservation* commercial relationships" with them and their company. *Id*. at 337 (emphasis added). The Supreme Court rejected the argument, concluding that such relationships were irrelevant to whether the tribal court had jurisdiction over the particular sale at issue. *Id*. at 338. The Court refused to bootstrap the bank's past dealings on tribal land to allow for jurisdiction under the first *Montana* exception. *Id*. Similarly, the YIN courts should not allow events extraneous to the claim in this case satisfy the first *Montana* exception. The YIN would have this court focus on the *de minimis* contacts with tribal lands—such as Mr. Smith's visits to the YIN reservation or his correspondence with the YIN Tribal council members—thereby asking this court to gloss over the absence of a requisite nexus between the contacts and the claims asserted, all of which include off-reservation conduct.

Prior to *Plains Commerce Bank*, the Supreme Court consistently compared the nonmembers' on-reservation contacts with the specific claims asserted in the tribal court action to determine whether the requisite nexus existed. *Atkinson Trading*, 532 U.S. at 656; *see also Strate*, 520 U.S. at 457 (concluding that lawsuit arising from a car accident did not seek to regulate contractor's historical work on the reservation). From these decisions, the following rule has emerged: "A non-member's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not 'in for a penny, in for a Pound.'" *Atkinson Trading,* 532 U.S. at 656. The trial court did not correctly apply this standard when determining that the YIN courts had jurisdiction to hear the alleged

claims. The YIN's argument fails because the trial court action did not seek to regulate any conduct of Mr. or Ms. Smith while on tribal land.

The YIN's action in tribal court sought recovery of damages for breach of contract, violation of fiduciary duties, and violation of the duties of confidentiality. R. at 3. These claims do not attempt to regulate the Smiths' conduct on tribal land. The tribe cannot reasonably argue that a nexus exists between the tribal action and Mr. Smith's or Ms. Smith's conduct. The YIN's first two claims seek to regulate off-reservation conduct of the Smiths as financial advisors. The final claim seeks to regulate Mr. Smith's individual off-reservation conduct in making disclosures to the Arizona Attorney General. The YIN cannot satisfy *Montana's* first exception by merely claiming that the tribal court action is related to the agreement between Mr. Smith and the YIN and a subsequent agreement between Mr. Smith and Ms. Smith. That argument would ignore the Supreme Court's holding that tribal litigation must regulate the nonmembers' activities on tribal land, not just loosely relate to the parties' general relationship. *Plains Commerce Bank*, 554 U.S. at 330. Therefore, absent a nexus between the tribal court action and the Smiths' on-reservation conduct, the first *Montana* exception does not apply.

c. <u>The second *Montana* exception does not apply.</u>

Under the second *Montana* exception, a tribal court has jurisdiction over " the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or health or welfare of the tribe." *Plains Commerce*, 554 U.S. at 329 (quoting *Montana*). The progeny of *Montana* have construed this exception narrowly. The Supreme Court has gone so far

as to limit the second *Montana* exception to conduct implicating four specific categories, the rights to: (1) punish tribal offenders; (2) determine tribal membership; (3) regulate domestic relations among members; and (4) prescribe rules of inheritance for members. *Strate*, 520 U.S. at 457.

Simply put, the claims brought in the YIN courts do not fit within any of these categories. It is not enough to speculate that the YIN may have sustained economic loss from Mr. Smith's disclosure and the subsequent cease and desist letter regarding the development of a recreational marijuana operation. The second *Montana* exception requires that "the challenged conduct be so severe as to 'fairly be called catastrophic for tribal self-government.'" *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306 (9th Cir. 2013)(quoting *Plains Commerce*, 554 U.S. at 341). The YIN cannot show that any of its core tribal functions or powers of self-government have been undermined by the Smiths.

3. Alternatively, This Court Should Remand with Instructions to Stay this Suit While the Smits Seek a Ruling in Arizona Federal District Court.

The Smiths should not be required to exhaust tribal remedies and the trial court should stay this suit. The concept of federal court abstention in cases involving Indian tribes, known as tribal exhaustion, "requires litigants, in some instances, to exhaust their remedies in tribal courts before seeking redress in federal courts." *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993). Exhaustion is not required where a tribal court's jurisdiction is clearly lacking. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001)(exhaustion excused where "it is clear . . . that tribal courts lack jurisdiction," and thus "adherence to the tribal exhaustion requirement . . . 'would serve no purpose other than delay.'")(quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 460 n.14 (1997)).

The Supreme Court has long held that tribal exhaustion is not required where it would violate "express jurisdictional prohibitions." *Iowa Mut. Ins. Co. v. LaPlainte*, 480 U.S. 9, 19 (1987). In the present case, the YIN has expressly limited its own jurisdiction, and the YIN and Mr. Smith contractually agreed that "all disputes arising from the contract . . . be litigated in a court of competent jurisdiction." R. at 1. The Seventh Circuit has held that "where venue is specified with mandatory or obligatory language, the clause will be enforced." *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006); *see also Altheimer & Gray*, 983 F.2d at 815("To refuse to enforcement of this [forum selection clause] contract provision would be to undercut the Tribe's self-government and self-determination."). The same prohibitions would extend to Ms. Smith because she entered into a contract that included the language expressly limiting jurisdiction. Taken together, the combination of the contractual language and the Tribal Code's limit on jurisdiction excludes the jurisdiction of any court of the YIN.

4. <u>The Smiths Did Not Waive the Objection to Personal Jurisdiction by Filing a Counterclaim Subsequent to their Special Appearance.</u>

Courts have long held that where a defendant appears by way of special appearance to specifically object to the jurisdiction of the court over his person, and the objection is overruled, he does not waive the objection by filing an answer and counterclaim. *Chicago Bldg. & Mfg. Co. v. Pewthers*, 63 P. 964, 966 (Okla. 1901). As the court in *Hansen v. McAndrwes*, 183 N.W.2d 1, 5 (Wis. 1971) recognized, "[a] special appearance is a procedural device . . . which enables the defendant to appear solely for the purpose of raising the jurisdictional question, and if so limited does not subject the defendant to consequences of a general appearance." It would be in error for this court to find that the Smiths made a general appearance by filing an answer and counterclaim

after their motions were erroneously denied. Traditional notions of fair play and justice would be frustrated if jurisdiction was asserted over the Smiths for their decision to participate in litigation that involved their reputations, businesses, and livelihoods.

B. Sovereign Immunity Cannot Protect the YIN, the EDC, nor its Officers.

1. The YIN Waived its Sovereign Immunity by the Language of the Contract and by Filing Suit Against Thomas and Carol Smith.

The YIN cannot claim sovereign immunity because the contract with Thomas Smith provided that any and all disputes arising from the contract would be litigated in a court of competent jurisdiction. R. at 1. For a tribe to relinquish immunity, that waiver must be "clear." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.,* 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112. The Court has considered what exactly constitutes "clear" in *C & L Enters. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411 (2001). There, the Court found the tribe had waived its immunity with the requisite clarity because an arbitration clause in the contract provided that awards might be reduced to judgments "in accordance with applicable proceedings in any court having jurisdiction thereof." *Id*. at 419. Because the tribe expressly contracted to adhere to a dispute resolution regime which included the entry of judgment upon an arbitration award which might be enforced in state courts, the tribe therefore waived its sovereign immunity. *Id*. at 420.

No case has ever held that "[t]he tribal immunity waiver… is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the words 'sovereign immunity.'" *Id*. (*quoting Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 659-60 (C.A.7 1996)). Looking to the law governing waivers of sovereign immunity by foreign nations is instructive. *Cf. Kiowa*

Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751, 759 (1998) ("In considering Congress' role in reforming tribal immunity, we find instructive the problems of sovereign immunity for foreign countries."). "Under the law of the United States ... an agreement to arbitrate is a waiver of immunity from jurisdiction in ... an action to enforce an arbitral award rendered pursuant to the agreement ...." Restatement (Third) of the Foreign Relations Law of the United States § 456(2)(b)(ii) (1987).

Even before *C & L*, courts have held that clauses which authorize a seller, in the event of a default, to bring an action on the note or to invoke *any remedy* allowable under state law clearly waives sovereign immunity. In *Nenana Fuel Co., Inc. v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992), the Supreme Court of Alaska found that a clause between the Tribal Government and Village Corporation and Nenana Fuel which contained such a clause constituted waiver, drawing from earlier precedent which provides that a tribe waives its sovereign immunity by agreeing to contract terms inconsistent with sovereign immunity. *Nenana Fuel* at 1232-33; *see Native Village of Eyak v. GC Contractors,* 658 P.2d 756 (Alaska 1983).

When the YIN and Thomas Smith executed a contract for Mr. Smith's services, that contract expressly provided that any and all disputes arising from the contract would be litigated in a court of competent jurisdiction. R. at 1. By agreeing to litigate disputes in any court of competent jurisdiction, the YIN clearly and unequivocally waived its sovereign immunity. It is of no consequence that the contract lacks the words 'waiver of sovereign immunity,' for this has never been required. If anything, this provision is more explicit than the arbitration clause in *C & L* because it directly addresses the *litigation* of disputes in courts of competent jurisdiction. This clause is undoubtedly inconsistent with

the YIN's sovereign immunity, and should be considered a waiver. To uphold sovereign immunity for a sovereign entity which expressly agreed to litigate disputes arising from the contract in any court of competent jurisdiction would render the provision meaningless, and render an anomalous result in the law governing waivers of sovereign immunity.

By filing suit against Thomas and Carol Smith the YIN has waived its immunity on matters arising from the controversy. By initiating a lawsuit, a tribe "waives immunity as to claims of the defendant which assert matters in recoupment—arising out of the same transaction or occurrence which is the subject matter of ... [the] suit." *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995) (citing *Rosebud Sioux Tribe v. A & P Steel, Inc.,* 874 F.2d 550, 552 (8th Cir.1989). Now, the mere initiation of a lawsuit in itself does not necessarily operate as a waiver of sovereign immunity, as was the case in *Oklahoma Tax Commission*, where the commencement of a suit by the Citizen Band Potawatomi did not waive the tribe's sovereign immunity with respect to the counterclaim enforcing the state's tax assessment and enjoining the tribal collection of taxes. *Id.* at 506–08, 111 S.Ct. at 908. In *Rupp*, the Eighth Circuit noted that the "Tribe did not merely file a quiet title action," but "affirmatively requested the district court to order the defendants to assert any claims in the disputed lands they possessed against the Tribe and exercise its equitable powers to, among other things, quiet title in the Tribe's name." *Rupp* at 1244. While waivers cannot be implied—and are to be strictly construed in favor of the tribe—the Tribe's "affirmative request that Rupp and Henderson assert their claims in the disputed land, satisfies this test." *Id*.

Just like Rupp and Henderson, Thomas and Carol Smith have been haled into court, and, pursuant to the Tribal Code, required to answer and assert defenses and assert counterclaims. This clearly passes the test spoken of in *Rupp*; to allow the YIN to call upon Thomas and Carol Smith to defend themselves, requiring them to assert defenses and counterclaims while nevertheless remaining immune in a tribal court would ensure a fundamentally unjust result, no matter the merits.

While § 2-214 of the Tribal Code provides that a compulsory counterclaim against the tribe does not waive the defense of sovereign immunity, it should be read in line with the narrow reasoning of *Oklahoma Tax Commission* which provides that tribes did not waive their sovereign immunity with respect to the counterclaims to enforce the state's tax assessment and enjoin the tribe from collecting taxes. *Oklahoma Tax Commission* at 506-08. This Court should look to long-standing doctrine which provides that by initiating this lawsuit, the YIN "necessarily consents to the court's jurisdiction to determine the claims brought adversely to it." F. Cohen, *Handbook of Federal Indian Law* 324 (1982); *see also United States v. Oregon,* 657 F.2d 1009, 1014 (9th Cir.1981). To do otherwise would "transmogrify the doctrine of tribal immunity into one which dictates that the tribe never loses a lawsuit." *Rupp* at 1245 (*see also Oregon,* 657 F.2d at 1014).

2. <u>The EDC is not an Arm the YIN.</u>

Should this Court determine that the YIN retains its sovereign immunity, such immunity should not extend to the EDC in any event. "Whether a tribe's sovereign immunity extends to entities which are arms of the tribe, [courts use] an analysis that considers tribal involvement in the creation and control of the entity, tribal intent to

clothe the entity with immunity, and whether the entity serves tribal sovereign interests such as economic development." 1-7 Cohen's Handbook of Federal Indian Law § 7.05 (2017). By looking at the nature of the EDC's creation and means of control, its failure to effectively clothe the entity with immunity, and its tenuous relationship to the YIN's sovereign interests, it is clear that the EDC is not an "arm-of-the-tribe," but actually a regional entity whose features reflect a regional, rather than tribal, focus. The tribe cannot simply apply a veneer of sovereign immunity to protect a mere business which it has a yet unreturned investment in.

Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173 (10th Cir. 2010) provides a useful framework in discerning the values articulated by Cohen. In determining whether a tribal casino and economic development authority were arms of the tribe, the Tenth Circuit considered a number of factors: (1) the method and basis of authority for the entity's creation; (2) the purpose of the entity; (3) the structure, ownership, and management—including the degree of control by the tribe; (4) tribal intention to extend sovereign immunity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting such immunity. *Id*. at 1191.

In examining the first factor, the court in *Breakthrough* found the language of incorporation to be almost dispositive. *Id*. Noting that the economic authority was formed under tribal law, the "descriptions of the Authority [were] significant," in that it was explicitly defined as "a body corporate and politic and an instrumentality of the Tribal Government and an authorized agency of the Tribe." *Id*. at 1192. There is no such description for the EDC; in fact, its express purpose and structure shows that it is

something more than an organ of the YIN. In *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011), the Eight Circuit determined that a federally-chartered insurance corporation which had assumed the rights and obligations of a tribally-owned predecessor was an arm of the tribe because "Amerind is a § 477 corporation that administers a tribal self-insurance risk pool, [it held] that Amerind 'serves as an arm of the [Charter Tribes] and not as a mere business and is thus entitled to tribal sovereign immunity.'" *Id*. at 685. Unlike the decidedly tribal-centric self-insurance risk pool, the EDC is dedicated to the economic development of the region, as well as the YIN. While the YIN has declared the EDC to be an arm of the Nation, the EDC's charter expresses its primary purpose "to create and assist in the development of successful economic endeavors, of any legal type of business, on the reservation and in Southwestern Arizona." R. at 1. The mission of the EDC clearly proposes to reach out beyond the reservation, belying the attempt by the YIN to protect it through simply declaring it an organ of the tribe.

The EDC also fails *Breakthrough*'s second factor because its purpose is to promote both regional and tribal prosperity, not solely the economic prosperity of the tribe. While, like the revenue from the tribal casino in *Breakthrough*, EDC pays money into the YIN general fund on an annual basis, that is where the similarities end. *Id*. at 1192. What the tribes intended to do with these revenues are clearly different. *Id*. The tribal allocation of revenues from the casino and economic authority in *Breakthrough* were specifically earmarked to reduce tribal reliance on gaming, a tribal trust fund, per capita distribution to members, education and elder care. *Id*. at 1192-93. The YIN has no such specific intentions with regard to the revenues generated, rather they are mere

profits paid into the general fund. It is not unfitting for an entity like the YIN, offering up a one-time $10 million loan, to seek generous returns; but the focus of these revenues are clearly returns on a loan, intended to one day turn a profit, in contrast to the purposes of the revenues allocated to the tribe in *Breakthrough*. Ultimately, these facts point towards an intent by the YIN to keep the EDC at arm's length, and these features hardwired in only further characterize the Tribe as a prudent investor, rather than a sovereign owner.

The EDC cannot satisfy the third factor set out in *Breakthrough*, because the structure, ownership, and management of entity indicate a meticulously kept distance between the YIN and the EDC. While the Tribal Council declared the EDC a wholly-owned subsidiary of the Nation as an "arm-of-the tribe," simply calling it such does not make it so. R. at 1. In *Breakthrough*, the Tenth Circuit noted that "seven members of the Board of Directors of the Authority are members of the Tribe who also are sitting members of the Tribal Council, which makes the Tribe's Council identical to the Authority's Board." *Id*. at 1193. Indeed, in *Breakthrough* the Tribe's chairperson also acted as the Chairperson of the economic authority. *Id*. Here, the corporate leadership is arranged in a radically different way.

The fact that the EDC is itself governed by its own board of directors as distinguished from the YIN's Tribal Council proves that it is less an "arm-of-the-tribe" than it is at arm's length to the YIN. Moreover, the composition of the EDC's board indicates both its mission beyond the reservation and the lack of tribal hegemony necessary to sustain its tribal character. For one, the board must be composed of those who must be versed in business endeavors—a value that it is sometimes, but not always, in harmony with tribal interests. R. at 1. The Tenth Circuit noted in *Breakthrough* that

characteristics like these cut against finding the economic authority an arm of the tribe; there, the Chief Financial Officer of the economic authority, the General Manager of the Casino, the Chief Financial Officer of the Casino, and twelve of the fifteen members of the casino's board of directors were nonmembers. *Id*. The EDC's corporate leadership more closely resembles the casino's leadership, rather than the economic authority's, in *Breakthrough*.

In determining the fourth factor—whether the tribe intended to invest the entity with sovereign authority—the circumstances of the EDC's formation and the statute governing its formation militate against such an intent. In *Breakthrough*, the Tenth Circuit noted the tribal ordinance establishing the Authority provided that the Authority was empowered to waive sovereign immunity, consent to jurisdiction, and to the levy of judgments against it. *Id*. at 1193. Critical to the court's analysis, the provision governing the extension of sovereign immunity referred to the corporations "[a]s a body corporate and politic and instrumentality and authorized agency of the Tribe." *Id*. Similarly, the YIN's Tribal Code provides sovereign immunity to "all Tribal corporations wholly owned, directly or indirectly, by the Tribe." 11-1003, Subdivision 3. Despite the YIN's declarations, the circumstances of the EDC's formation and nature indicate that it has never been wholly owned, directly or indirectly, by the tribe. The one-time loan, and the fact that 50 percent—rather than all—of the EDC's profits be paid to the tribe show that the EDC is not a wholly owned by the YIN, directly or indirectly. Simply put, the YIN's statute does not apply.

Moreover, in failing to provide a means to waive sovereign immunity, the Tribal Council made it clear that the EDC was not an arm of the tribe of which sovereign

immunity applied; either the EDC was prohibited from ever waiving sovereign immunity, or it was never granted in the first place. The absence of language waiving sovereign immunity, paired with the explicit provision of a sue and be sued clause, clearly indicates that the EDC never bore any sovereign immunity. In any event, this provision should reach only as far as the Tribal Council's expressed intentions. The inclusion of this provision was intended to protect the entity and the nation from *unconsented litigation*. Because the Tribe consented to litigation in its contract with Thomas Smith, whose work extended to the formation and operation of the EDC, any sovereign immunity that exists should not extend to the EDC. R. at 1.

It is true that the YIN declared the EDC to be a wholly owned subsidiary of the Nation, and an "arm-of-the-tribe," and even went so far as to mandate in the EDC's charter that the corporation, its board, and all employees were protected by sovereign immunity to the fullest extent of the law. However, the EDC was formed and operates in a manner radically contrary to the sort of whole ownership which would entail sovereign immunity. The YIN cannot simply bootstrap its declarations. If the YIN's Tribal Council wished to create an economic development authority, it could have done so by forming the corporation closer along the lines of *Breakthrough*.

In looking to the fifth factor, the financial relationship between the tribe and the entity, it is clear that the YIN acts more as an investor than an owner. The ability of the tribe to remove directors for cause, or for no cause, at any time, by a 75% vote indicates the gravity of the tribe's investment, not the essential nature of the EDC itself. R. at 1. After all, the Tribal Council initially funded the EDC with a one-time $10 million loan from the Nation's general fund; it is reasonable and good business-sense to establish

some mechanism to safeguard such a significant investment. R. at 1. Contrast the requirement that the EDC pay 50% of its profits to the requirement in *Breakthrough* that 100% of the Casino's profits in be paid to the tribe. *Id*. at 1195. Additionally, the EDC is authorized to buy and sell real property in fee simple both on and off the reservation, as well as any other types of property in whatever form of ownership. R. at 2. Moreover, the EDC's separation from the YIN itself is further evinced by its inability to encumber, or implicate in any way, the assets of the Nation. R. at 2. Indeed, the EDC does not even possess the power to borrow or lend money in the name of, or on behalf of, the Nation or to grant or permit any liens or interests of any kind to attach to the assets of the Nation. R. at 2. These provisions, taken with the existence of the EDC's sue and be sued provision, indicate that the Tribal Council sought to create a firewall between the two, divorcing the EDC from the YIN of any sovereign character.

Finally, the Court should consider whether the overall purposes of sovereign immunity are served by a conclusion that the EDC has immunity. Namely, whether the EDC is so closely related to the YIN that its "'activities are properly deemed to be those of the tribe.'" *Breakthrough* (*citing Allen v. Gold Country Casino,* 464 F.3d 1044, 1046 (9th Cir.2006)). Here, it is important to distinguish between the sort of tribal economic development which strikes at the core of tribal self-determination, and regional economic development which might produce significant returns for a sovereign investor. In *Breakthrough*, the Tenth Circuit recognized the long-standing congressional policy favoring tribal economic development, and such development promotes tribal economic self-sufficiency—the purpose of sovereign immunity in the first place. *Breakthrough* at 1195; *Allen,* 464 F.3d at 1047. In contrast, no sovereign immunity exists for tribal

enterprises created solely for business purposes, with no declared purpose of tribal or economic development. *Breakthrough* at 1195; *Trudgeon v. Fantasy Springs Casino,* Cal.Rptr.2d 65, 70 (1999); *Dixon v. Picopa Constr. Co.,* 772 P.2d 1104, 1110 (Ariz. 1989).

By defining itself as an entity dedicated to regional as well as tribal economic development, the EDC placed itself outside of the policy objectives of sovereign immunity. In becoming a regional player rather than a tribal one, the YIN indicated an intent to see profits from non-tribal economic development; this sort of economic activity clearly falls beyond the ambit of sovereign immunity's core purposes. Moreover, in *Breakthrough*, determining the economic role of the Authority was easy because one hundred percent of the Casino's profits were dedicated to the Tribe. *Id*. at 1195. Here, only half of the profits go to the tribe; that the Tribal Council thought this sufficient when they chartered the EDC shows that it does not form the bedrock of the YIN's economic life.

A fair consideration of these factors as they apply here clearly shows that sovereign immunity cannot extend to the EDC. To recognize sovereign immunity in the EDC would extend a singular and unparalleled protection to an entity that explicitly acts as a regional economic player, of which the YIN's development is merely a part. None of this is to say that the YIN could not form an economic development authority that carried with it the protections of sovereign immunity, but by chartering the EDC with a one-time loan, mandating a composition and leadership structure markedly distinct from the tribe, and requiring only a cut of the profits as opposed to the whole, the YIN established a tribal enterprise that cannot claim the protections of the YIN's sovereign immunity.

a. The EDC's CEO and Accountant are Not Protected by Sovereign Immunity.

In no event does sovereign immunity extend to EDC's CEO, Fred Captain, nor does it extend to the EDC's accountant, Molly Bluejacket. Of course, because the YIN waived its immunity, there is no basis for Captain or Bluejacket to claim such immunity. Additionally, since the EDC is an entity separate from the YIN, the EDC and its officers never enjoyed the protections of sovereign immunity. Even then, sovereign immunity does not apply to officers in their individual capacity. Ultimately, Captain and Bluejacket may be sued in their individual capacities because they cannot claim the protection of sovereign immunity, nor any other form of immunity.

While "immunity protects tribal officials acting within the scope of their authority… the Supreme Court held that tribal employees sued in their individual capacities were not clothed in tribal sovereign immunity." 1-7 Cohen's Handbook of Federal Indian Law § 7.05; *Fletcher v. United State*s, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). While there is no sovereign authority to extend because the YIN waived its immunity, nor would it have extended to the EDC in any event, the law clearly states that individual employees sued in their individual capacities may not claim sovereign immunity.

Of course, "suits for damages against employees or officers in their individual capacities are barred by qualified immunity unless the alleged actions were not colorably within the authority delegated by the tribe." 1-7 Cohen's Handbook of Federal Indian Law § 7.05 (2017); *Burrell v. Armijo*, 603 F.3d 825, 832–834 (10th Cir. 2010); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 491 F. Supp. 2d 1056, 1072 (D. Okla. 2007); *Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 307 (N.D.N.Y. 2003); *Pistor*

v. Garcia, 791 F.3d 1104, 1114 (9th Cir. 2015). In *Pistor*, the Ninth Circuit sought to clarify the general rule that officials may be sued in their individual capacities in the context of a § 1983 claim where casino officials were alleged to have violated plaintiffs' constitutional rights:

> By its essential nature, an individual or personal capacity suit against an officer seeks to hold the officer personally liable for wrongful conduct taken *in the course of her official duties. Graham,* 473 U.S. at 165, 105 S.Ct. 3099. As the officer *personally* is the target of the litigation, she may not claim sovereign immunity—and that is so regardless whether she was acting under color of tribal or of state law at the time of the wrongful conduct in question.

Id. at 1114. There is no evidence Captain or Bluejacket were acting outside the course of their official duties. Thus, in no event can an officer claim sovereign immunity when sued in their individual capacity; it is merely then a question as to whether any other form of immunity applies.

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978), suggests that the doctrine of *Ex Parte Young*, 209 U.S. 123, extends to the tribal contexts, "allowing suits against tribal officials in their official capacities for declaratory or injunctive relief." 1-7 Cohen's Handbook of Federal Indian Law § 7.05 (2017). *See also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2035 (2014), suggesting that the State of Michigan might pursue actions injunctive relief against tribal officers operating an unauthorized casino on state lands; *Vann v. United States Dep't of Interior*, 701 F.3d 927 (D.C. Cir. 2012), allowing suit for injunctive relief against Cherokee Nation Chief by Cherokee Freedmen for alleged treaty violations. The question before this Court is not one of what remedies are available, but what forms of immunity may Captain and Bluejacket claim in their defense against the Smith's counterclaims. This Court should allow the Smith's case to

move forward, allowing the trial court to fashion an appropriate remedy upon litigating the merits.

The Court has also suggested that officials may be able to claim some other "personal immunity defenses, such as prosecutorial or official immunity." *Lewis v. Clarke*, __ U.S. __, 137 S. Ct. 1285, 1289, 1292, 1293 n.2 (2017). There are, of course, forms of immunity as distinguished from sovereign immunity, *Harlow v. Fitzgerald,* 457 U.S. 800, 811–815, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), but none apply in this case. As CEO and Accountant, neither Captain nor Bluejacket have any basis to assert executive immunity concerned with "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910 (1978). Nor is any such defense available, given that the trial court dismissed the Smiths' claims on the basis of sovereign immunity. *Travelers Casualty & Surety Co. of America v. Pacific Gas & Elec. Co.,* 549 U.S. 443, 455, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007).

In sum, neither Captain nor Bluejacket can successfully dismiss the suits against them in their individual capacities, since personal capacity suits are not subject to sovereign immunity protections and no other form of immunity exists.

CONCLUSION

The YIN's suit against the Smiths should be dismissed because there was never personal jurisdiction over the Smiths, nor was there subject matter jurisdiction for this case. Alternatively, this Court should stay this suit so that the Arizona federal district court can decide whether jurisdiction in tribal court is proper. Additionally, this Court should allow the Smith's suit against the YIN to proceed because the YIN waived its

sovereign immunity, and neither the EDC nor its officers would have been protected by such immunity.

REQUEST FOR ORAL ARGUMENT

Oral argument is requested. The Smith's own assessment of the case is that there was never any personal nor subject matter jurisdiction, and the case is straightforward. But given the position of the YIN that it, the EDC, and its officers are protected from the Smith's claims by sovereign immunity, complexity is introduced that justifies oral arguments, should this Court think those aspects merit in-depth consideration.

Respectfully Submitted,

_____

Team 248
Counsel for Defendants/Appellants